Filed 3/29/02

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THERESA M. PICKRELL, Plaintiff and Appellant, v. RALEY'S SUPERMARKETS, Defendant and Respondent.	A093278 (Mendocino County Super. Ct. No. 81223)

On the afternoon on February 4, 1999, Henry Ornelas left his job in the meat department of a Raley's Supermarket in Santa Rosa and started driving home to Ukiah. Ornelas stopped in Hopland to have a beer at "The Keg." He left "The Keg" and continued toward Ukiah. When he was approximately one mile from home, he fell asleep at the wheel, and his vehicle struck a pedestrian, Theresa M. Pickrell.[1] Pickrell sued Ornelas and Raley's Supermarkets (Raley's) for damages stemming from personal injuries sustained in the accident.

The issue of whether Ornelas was acting in the scope and course of his employment with Raley's when his vehicle struck Pickrell was tried to the court in a bifurcated proceeding. The court found that Ornelas was not acting in the course and scope of his employment. More specifically, the court found that the general rule that employees going to and coming home from work are not acting within the course and scope of their employment (the "going and coming" rule) applied and that none of the

exceptions to that rule urged by Pickrell was applicable. Judgment was thereafter entered in Raley's favor. Pickrell appeals from that judgment. We affirm.

I. FRAMEWORK FOR ANALYSIS

Pursuant to the doctrine of respondeat superior, employers are liable for the torts of their employees committed within the course and scope of their employment. (*Munyon v. Ole's, Inc.* (1982) 136 Cal.App.3d 697, 701 (*Munyon*).) The burden of proof is on the plaintiff to establish that an employee committed a tort while acting within the course and scope of his employment in order to extend liability for that tort to the employer. (*Ibid*.)

Under the "going and coming" rule, an employee going to and coming home from work is "ordinarily considered outside the scope of employment so that the employer is not liable for his torts." (*Hinman v. Westinghouse Elec. Co.* (1970) 2 Cal.3d 956, 961 (*Hinman*).) Two theories have been employed to support the "going and coming" rule. On occasion, courts have found that the employment relationship is "suspended" from the time an employee leaves until he or she returns to work. Other courts have determined that, in commuting to and from work, an employee is not rendering service to his or her employer. (*Ibid*.)

There are several exceptions to the "going and coming" rule. Pickrell asserts before this court that the trial court erred as a matter of law in failing to apply two such exceptions. She first points to the fact that Ornelas was originally assigned to work in the Ukiah Raley's store but had been transferred to the Santa Rosa store when sales declined in Ukiah. Pickrell then argues that the court erred in failing to determine that Raley's choice to assign him to work in the Santa Rosa store conferred an "incidental" benefit on Raley's, a benefit that merits applying the doctrine of respondeat superior to hold Raley's liable. She further points out that Ornelas was assigned to perform a special "deep cleaning" process on the day of the accident. Accordingly, she contends that the court

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1 Ornelas was tested at the scene and was found not to be intoxicated when his vehicle struck Pickrell.

erred in failing to determine that Ornelas's trip to and from Santa Rosa on the day of the accident constituted a "special errand" requested by Raley's. Pickrell finally argues that public policy considerations mandate application of the doctrine of respondeat superior to this case.

Before we consider each of Pickrell's arguments, we must establish the appropriate standard of review.

II. STANDARD OF REVIEW

Pickrell and Raley's have contrasting views of the standard of review we should apply in this case. Pickrell asserts that the "essential facts herein are undisputed" and, thus, that we may independently determine "the legal effect of those facts." Raley's, on the other hand, characterizes Pickrell's arguments as attacking the sufficiency of the evidence to support the trial court's findings. Raley's goes on to assert that the facts are *not* undisputed. Raley's contends that, in summarizing the facts relevant to our review, Pickrell has ignored many facts that are "damaging to her case." Raley's concludes that Pickrell's failure to call our attention to all material evidence presented at trial gives us the discretion to "treat the substantial evidence issue as waived and to presume the record contains evidence to sustain every finding of fact made by the trial court." Raley's then proceeds to analyze each of the issues raised by Pickrell, contending that substantial evidence supports the trial court's findings on those issues. In reply, Pickrell contends that Raley's fails to understand her arguments. She states that she "is not contending that the evidence is insufficient to support the trial court's determination, thus requiring review to determine if supported by substantial evidence. [Citations.] Rather, [she] maintains that the operative facts are undisputed, therefore application of *respondeat superior* presents a question of law. [Citations.]"

Before analyzing the parties' arguments about the standard of review, we first observe that the trial court in this case did much more than summarily conclude that the "going and coming" rule applied and that the various exceptions to that rule urged on the court by Pickrell did not. Indeed, the trial court made an extended series of detailed, factual findings about the relationship between Ornelas and Raley's. Those factual

findings constitute the underpinnings for the court's conclusions that Ornelas was not on a special errand for Raley's when he struck Pickrell and that Ornelas's work in Santa Rosa on the day of the accident did not confer the type of incidental benefit on Raley's that is required to circumvent the "going and coming" rule. Yet, with the exception of some passing comments by Raley's, neither party has chosen to describe the trial court's factual findings in their briefing before this court.

The question of whether any of the exceptions to the "going and coming" rule at issue in this case is potentially applicable is a mixed one of fact and law. As noted above, the trial court made detailed factual findings that served as the basis for its legal conclusions. As to those factual findings, we defer to the trial court. (*McGhan Medical Corp. v. Superior Court* (1992) 11 Cal.App.4th 804, 809.) Indeed, in the absence of some properly developed claim that no substantial evidence supports some or all of those findings, we must take them as established facts for appellate purposes. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) However, in our view, application of those facts to the exceptions to the "going and coming" rule involves the type of "critical consideration" of "legal principles and their underlying values" that merits independent review. (See *Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888.)

We will now proceed to describe the trial court's findings of fact relevant to the issues raised in this appeal. We will then apply those findings in making an independent assessment of whether either of the exceptions to the rule suggested by Pickrell should be invoked to avoid the "going and coming" rule.

III. FACTS

Ornelas was employed as a meat cutter and was paid an hourly wage. His employment was subject to a union agreement under which Raley's was obligated to use its best efforts to provide him with 40 hours of work per week. Under the agreement, Raley's could assign Ornelas to work at any one of four stores in Sonoma County: Ukiah, Rohnert Park, Santa Rosa and Windsor. Ornelas's original "home store" was in Ukiah. However, when the Ukiah store experienced a decline in business, Ornelas was first

assigned to work in Windsor and was subsequently transferred to Santa Rosa. He had worked steadily at the Santa Rosa store for approximately 13 weeks before the accident. The court specifically found that, as of the time of the accident, Ornelas "had been transferred to the Santa Rosa store where he was a regular full time employee."

At the time of Ornelas's transfer, Raley's knew that Ornelas lived in Ukiah and would have to commute to Santa Rosa to fulfill his job responsibilities. However, he was not required to have a car at work, and he had "no expectation" to be sent to another store once he reported to work in Santa Rosa.

Raley's wanted Ornelas to become the "number two" person in the Santa Rosa meat department, a position he had held in Ukiah. A number two person runs the meat department in the absence of the manager. When he acts in that capacity, he is paid at the same rate as the manager. A number two person ordinarily remains at the store in which he holds that position and does not move to another store. Ornelas wanted to return to Ukiah and was concerned that accepting the number two position would prevent that return. However, he was assured by the head of the meat department in Santa Rosa that he would not stand in Ornelas's way if sufficient hours became available in Ukiah to justify a transfer back to that store. Nonetheless, the court found that Ornelas had no "firm commitment" from Raley's that he would ever return to the Ukiah store.

"Deep cleaning" is a "regularly scheduled activity" in the meat department of all Raley's stores. The process consists of an extensive cleaning of the meat case and involves partial disassembly of that case. Because the meat case must be torn down, the work must be performed when the store is closed. Several employees of the Santa Rosa meat department were capable of performing deep cleaning, and they had performed that work on occasion. As part of his duties in Santa Rosa, Ornelas was required to report for work one morning a week at 4:00 to deep clean the refrigerator cases before the store opened for business. That work is referred to as "off standard work;" however, the employee is paid at his usual rate of pay. The court specifically found that the term " '[o]ff standard work' does not indicate unusual or extraordinary work."

The Santa Rosa work schedule was posted several days before the accident. Ornelas was scheduled to perform deep cleaning work on the day of the accident. When the schedule was posted, the head of the meat department told Ornelas that the meat department was going to have "company" on that day. That meant that a supervisor of the meat division would be visiting. However, that visit did not affect Ornelas's work or his schedule.

As noted, the schedule on the day of the accident called for Ornelas to report for work at 4:00 a.m.; he was to take a lunch hour during his shift. However, on many occasions, Ornelas reported to work at 5:00 a.m. and worked through lunch. Although that choice was against company policy, the head of the meat department did not object to Ornelas's choice to work through lunch. On the day of the accident, Ornelas began work at 5:00 a.m. and continued through without a lunch break. When his eight hours were completed, he asked the manager if he wanted him to stay because the supervisor was still on the premises. The manager allowed Ornelas to follow his usual routine and leave after eight hours.

Occasionally, as Ornelas was driving home to Ukiah, he would stop at a gas station "to relieve himself." Sometimes, he would also buy a soft drink or bottled water during those stops. On occasion, as well, he would stop and have a beer. He followed that procedure on the day of the accident, having one beer at "The Keg" in Hopland. The accident occurred when Ornelas fell asleep at the wheel between Hopland and his home in Ukiah.

IV. ANALYSIS

A. *Ornelas's Commute between Ukiah and Santa Rosa Did Not Confer an "Incidental Benefit" on Raley's*

One exception to the "going and coming" rule is found in situations where the employee's "trip involves an incidental benefit to the employer, not common to commute trips by ordinary members of the work force." (*Hinman, supra,* 2 Cal.3d at p. 962.) Pickrell calls our attention to *Hinman,* in which the Supreme Court found that doctrine applicable to an accident caused by Frank Herman, an elevator constructor's helper

employed by Westinghouse. Herman's work was assigned from a central office. However, Herman did not ordinarily report to that office. Instead, he went directly from home to the jobsite; at the end of the day, he returned home from the jobsite. Herman was paid travel expenses and was also paid for "travel time" depending on how far away the job was from the Los Angeles City Hall. The accident in question occurred as Herman was returning home from a job that was "15 to 20 miles" from city hall. (*Id.* at pp. 958-959.) Pickrell quotes from a portion of the Supreme Court's reasoning for imposing liability on Westinghouse under the "incidental benefit" doctrine: "It cannot be denied that the employer's reaching out to the distant or larger labor market increases the risk of injury in transportation." (*Id.* at p. 962.)

Pickrell likens Raley's situation in the case before us to Westinghouse's in *Hinman*. She argues that Raley's had the right to assign meat cutters to work in different stores, which had the benefit of allowing Raley's to fulfill its obligations under the union contract and "keeping its stores functioning properly." She also contends that Ornelas's travel from Ukiah on February 4, 1999, allowed Raley's to complete " 'off-standard' work" which served to benefit the entire department. According to Pickrell, Ornelas's work permitted the meat department to be prepared for the department supervisor's visit on February 4, 1999. Thus, she reasons that Ornelas's travel on that day conferred the type of "incidental benefit" on Raley's that justifies an exception to the "going and coming" rule. Pickrell's arguments lack merit.

The principal problem with Pickrell's argument is that she misses the full rationale underlying application of the "incidental benefit" doctrine outlined in *Hinman*: "There is a substantial benefit to an employer in one area to be permitted to reach out to a labor market in another area or to enlarge the available labor market *by providing travel expenses and payment for travel time.* It cannot be denied that the employer's reaching out to the distant or larger labor market increases the risk of injury in transportation. In other words, the employer, having found it desirable in the interests of his enterprise to pay for travel time and for travel expenses and to go beyond the normal labor market or to have located his enterprise at a place remote from the labor market, should be required

to pay for the risks inherent in his decision." (*Hinman, supra,* 3 Cal.3d at p. 962; italics added.)

Here, of course, Ornelas was not paid for his travel time. As pointed out by the trial court, "Ornelas determined where he would live, the miles involved in his commute, the speed with which he drove." We agree, as well, with the rest of the trial court's determinations on this issue: "[Ornelas's] was an ordinary commute. Raley's did not benefit [any more] from Ornelas['s] commute than it did from the commute of another worker that showed up daily at the same store." In sum, we conclude, as a matter of law, that Ornelas's commute from Ukiah to Santa Rosa did not confer the type of "incidental benefit" on Raley's that would justify deviation from the rule that those coming from and going to work are not within the course and scope of their employment. (*Hinman, supra,* 2 Cal.3d at pp. 962-963; see also *Henderson v. Adia Services, Inc.* (1986) 182 Cal.App.3d 1069, 1073-1078 [no incidental benefit realized by employer of temporary employee, who was sent to different jobsites at employer's direction but who was not compensated for travel time or reimbursed for travel expenses].)

B. *Ornelas's Commute on the Day of the Accident Did Not Constitute a "Special Errand"*

"When [an] employee is engaged in a 'special errand,' either as part of his regular duties or at the specific order or request of his employer, the employee is considered to be in the scope of his employment from the time he commences the errand until he returns, or until he deviates from his special errand for personal reasons. [Citation.] Examples of actions considered 'special errands' include getting or returning tools [citation], attending a social function where the employee's attendance is expected and it benefits the employer [citation], and returning to the employee's home from a service call for the employer's business when the employee is on call at his own home for his employer's business. [Citation.]" (*Munyon, supra,* 136 Cal.App.3d at p. 703.)

Pickrell cites *Felix v. Asai* (1987) 192 Cal.App.3d 926, 931-932 (*Felix*) and *L.A. Jewish Etc. Council v. Ind. Acc. Com.* (1949) 94 Cal.App.2d 65, 68-69 (*L.A. Council*), for the proposition that "[p]erformance of the errand at irregular hours may be considered in

determining the employee's travel to be within the scope of employment." She then argues that Ornelas was the only meat cutter who was assigned to perform deep cleaning duties on February 4, 1999—a task not performed the preceding week. She further alleges that Ornelas was required to " 'do a little extra' " that day in light of the supervisor's visit and that the " 'off-standard' " duties performed that day were for the benefit of all department employees and were of special benefit to Ornelas because he received premium pay for working early hours. She further contends that Ornelas worked irregular hours that day because he was permitted to work without a lunch break. She concludes that the irregular hours led to a reduction in productivity "highlighted by the fact that [Ornelas] was unable to keep his car on the road" that day. Pickrell goes on to argue that Ornelas's "special errand" on February 4, 1999, did not terminate when Ornelas stopped for a beer because the stop did not constitute the type of "complete abandonment" of his errand "to fall outside the scope of employment." We need not address the issue of abandonment because it is clear that Ornelas's commute on February 4, 1999, did not constitute a "special errand" in the first instance.

We begin our analysis by observing that Pickrell has correctly cited one of the principles that may be distilled from *Felix* and *L.A. Council*: an employee who is asked to perform work at irregular times may be found to be involved in a "special errand" on behalf of his employer. However, that principle is much more limited in scope than suggested by Pickrell. In *General Ins. Co. v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 595, 601, the case cited by *Felix* for the proposition that an employee who is called to work for a special task at irregular hours is in the scope of employment from the beginning of the trip to work to his return home, the Supreme Court noted that the special errand rule ordinarily does not apply when the only special component is the fact that the employee began work earlier or left work later than usual.

Here, Ornelas certainly arrived at an early hour to perform deep cleaning. However, deep cleaning was a task Ornelas had undertaken in the past. Put somewhat differently, it was one of a number of tasks Ornelas performed regularly, albeit on a rotating schedule. Further, the hours were not unusual or extraordinary. As found by the

trial court, the employee performing deep cleaning regularly arrived at 4:00 a.m. so that the work could be completed when the store was closed. Thus, neither Ornelas's work assignments on February 4, 1999, nor his hours of work on that day were extraordinary in any way. They were part of a rotating cycle of regular tasks performed by Ornelas and other meat cutters in the Santa Rosa Raley's. Thus, we find no basis, as a matter of law, for invoking the "special errand" exception to the rule that those going to and coming from work are not in the scope of their employment. (*Munyon, supra,* 136 Cal.App.3d at p. 703.)

C. *Public Policy Considerations Do Not Require Application of Respondeat Superior Herein*

Pickrell finally argues that it would be unjust not to apply the doctrine of respondeat superior in this case. In support of that argument, she asserts that the doctrine is based on the sentiment that it would be unjust to permit an enterprise to disclaim responsibility for an injury that occurs in the course of the characteristic activities of the enterprise. Based on that principle, she argues that it would be unjust to permit Raley's to escape liability in the case before us because Raley's gained so much from Ornelas's travel: "meat departments were staffed as needed to meet varied business conditions; obligations to the union and to full-time employees were met; 'off-standard' work was accomplished without disrupting customer access to products offered for sale; work schedules were flexibly adjusted to satisfy business needs." We find Pickrell's argument unavailing.

Pickrell's argument completely ignores the rationale behind the "going and coming" rule. As reflected above, the rule reflects the obvious: at some point during an average day, an employee's work should be deemed completed; unless his activities provide substantial benefit to the employer, it is unfair to extend liability to the employer when the employee commits a tort. Employees merely going to and coming from work do not provide the type of benefit to the employer that justifies holding the employer liable for a tort committed during the employee's commute. (*Hinman, supra,* 2 Cal.3d 961.)

Here, the trial court specifically found that, as of February 4, 1999, Ornelas had become a "regular full time employee" in the Santa Rosa store. Further, the court found that the " 'deep cleaning' " operation Ornelas undertook that day was a "regularly scheduled activity" that began at a standard time so that work could be completed while the store was closed.

In sum, Ornelas's situation was similar, if not identical, to that of countless employees whose work involves a lengthy commute and somewhat variable hours, depending on the tasks assigned on any given work day. Contrary to Pickrell's suggestion, the policies underlying the rules described herein mandate that Raley's not be found liable for a tort committed by Ornelas during his commute. Any change in those policies is a matter for our Supreme Court or the Legislature—not this court.

V. CONCLUSION

The judgment is affirmed. Pickrell to bear costs of appeal.

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McGuiness, P.J.

We concur:

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Corrigan, J.

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Parrilli, J.